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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

MOTION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OF THE CONGRESS OF HISPANIC EDUCATORS.

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IN THE
SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

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SUBJECT INDEX

Page

Motion of the Puerto Rican Legal Defense and Education Fund, Inc. For Leave to File Brief *Amicus Curiae* vi

Interest of *Amicus Curiae* 1

Preliminary Statement 1

Reasons for Granting the Writ . . . 1

Introduction 1

A Profile of Puerto Ricans. . 1

Bilingual-Bicultural Education 3

By Unduly Restricting The District Court's Equitable Power, The Court of Appeals Has Raised Important Issues Which Should Be Reviewed By This Court. 7

The Analysis of The Court of Appeals Was Erroneous 11

Conclusion. 15

TABLE OF AUTHORITIES CITED

Cases

Pages

Arvizu v. Waco Independent School District, 373 F.2d 499 (5th Cir. 1974). 11

Aspira of New York v. Board of Education of the City of New York, 72 Civ. 4002 (S.D.N.Y. 1972), 65 F.R.D. 541 (S.D.N.Y. 1975) . vii, 11

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) . . . 7

Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) . 7, 8, 14

Evans v. Buchanan, Civ. Act. No. 1816 (D. Del. October 21, 1975) . vii

Green v. County School Board, 391 U.S. 430 (1968) 12

Griffen v. County School Board, 377 U.S. 218 (1964) 8

Hernandez v. Texas, 347 U.S. 475 (1954) 1

Katzenbach v. Morgan, 384 U.S. 641 (1966) 1

Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973) . 1, 2, 9

Table of Authorities Cited

Pages

Keyes v. School District No. 1, Denver, 313 F. Supp. 61 (D. Col. 1970). 9, 10

Keyes v. School District No. 1, Denver, 380 F. Supp. 673 (D. Col. 1974). 9, 14

Lopez de Vega v. Thomas, Civ. No. 75-714 (E.D. Pa. 1974). . . . vii

Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974) 11

Morgan v. Kerrigan, No. 72-911, (D. Mass. June 5, 1975) vi

Rios v. Reed, 75 Civ. 296 (E.D.N.Y. 1975) vii

Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). 11

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). 9

United States v. Board of Education of Waterbury, Civ. Act. No. 13,465 (D. Conn. May 15, 1975). . vii

Table of Authorities Cited

Pages

United States v. Montgomery County Board of Education, 395 U.S. 225 (1970). 8

United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972) 11

White v. Register, 412 U.S. 755 (1973) 1

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) . . 9

Statutes

20 U.S.C. Section 880b 3

20 U.S.C. Section 1601 et seq. . . 11

Texts

J. Coleman, Equality of Educational Opportunity (1966) 5

C. Lavatelli, Piaget's Theory Applied to An Early Childhood Education (1973) 5

M. Seville and R. Troike, A Handbook of Bilingual Education (rev. ed. 1971). 5

Table of Authorities Cited

Pages

United States Commission on Civil Rights; A Better Chance to Learn: Bilingual-Bicultural Education (May, 1975). 4, 6

United States Dep't of Commerce, Bureau of the Census; Persons of Spanish Origin in the United States, November, 1969 (February, 1971). 2

United States Department of Health, Education and Welfare; Programs Under Bilingual Education Act (Title VII, ESEA): Manual For Project Applicants and Grantees (1971) 4

Wagenheim, A Survey of Puerto Ricans on the U.S. Mainland in 1970 (1975) 2, 3

MOTION OF THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Puerto Rican Legal Defense and Education Fund, Inc. (the "Fund") requested the parties in this case to consent to the filing of the attached brief amicus curiae. Only petitioners have granted their consent; respondents, however, do not object to the filing of an amicus curiae brief.[1]

The Fund is a privately funded, not-for-profit, New York corporation organized in 1972. Its mandate includes conducting litigation concerning issues which affect the Puerto Rican community as a whole. In that connection, the Fund has commenced and participated in lawsuits involving voting rights, public assistance, migrant labor, employment discrimination and criminal justice.

In addition, the Fund devotes a substantial amount of its resources to educational rights litigation. Many of these lawsuits involve the implementation of bilingual-bicultural educational programs to remedy the deprivation of an equal educational opportunity. In Boston, (Morgan v. Kerrigan, No. 72-911 (D. Mass. June 5, 1975)) (Memorandum of Decision

1. Petitioners' and respondents' letters have been filed with the Clerk.

and Remedial Orders); Waterbury, Connecticut (United States v. Board of Education of Waterbury, Civ. Act. No. 13, 465, (D. Conn. May 15, 1975)) (Ruling on motion to intervene); Wilmington, Delaware (Evans v. Buchanan, Civ. Act. No. 1816 (D. Del. October 21, 1975)) (Order granting motion to intervene); New York City (Aspira of New York v. Board of Education of City of New York, 72 Civ. 4002 (S.D.N.Y. 1972), see 65 F.R.D. 541 (S.D.N.Y. 1975)); Philadelphia (Lopez de Vega v. Thomas, Civ. No. 75-714 (E.D. Pa. 1974)), and in Suffolk County, New York (Rios v. Reed, 75 Civ. 296 (E.D.N.Y.)), the Fund is prosecuting lawsuits which seek or have already achieved for Hispanos implementation of the type of remedy which the Tenth Circuit rejected. The Circuit Court's opinion runs counter to a growing body of authority which requires school districts to adopt bilingual-bicultural educational programs to rectify violations of the rights of Hispanos to an equal educational opportunity.

The Fund has a substantial interest in checking the Tenth Circuit's unwarranted interference with the District Court's proper exercise of its equitable authority to adopt appropriate and effective remedies for the unlawful educational deprivation suffered by Hispanos in Denver. The annexed brief amicus curiae is submitted to apprise this Court of the national implications of the Tenth Circuit's decision, particularly as to children in tri-ethnic communities.

Wherefore, the Fund respectfully requests that the instant motion to file the accompanying brief amicus curiae be granted.

Dated: November 13, 1975

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the accompanying motion, supra.

PRELIMINARY STATEMENT

Amicus curiae relies on petitioners' treatment of this Court's jurisdiction, the questions presented for review, constitutional and statutory provisions involved, and the statement of the case.

REASONS FOR GRANTING THE WRIT

Introduction:

A Profile of Puerto Ricans

According to the 1970 census, there are at least 10.6 million "persons of Spanish origin" in the United States. Hispanos constitute the Nation's second largest minority, and, in part, because they have suffered from pervasive patterns of discrimination, this Court has deemed them to be an identifiable group for purposes of the Fourteenth Amendment. See, e.g., Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); White v. Register, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954); see also, Katzenbach v. Morgan, 384 U.S. 641 (1966).

There are four major groups of "persons of Spanish origin" according to the census: Mexican Americans (6.3 million), Puerto Ricans (1.5 million), Cubans (0.7 million), and persons of "Central or South American

or other Spanish origin" (2.0 million).

Although over one million Puerto Ricans reside in New York City, there are significant and growing numbers of Puerto Ricans in Connecticut, Massachusetts, New Jersey, Pennsylvania, Illinois, Ohio and Florida. These communities or "barrios" generally exist in urban areas. Wagenheim, A Survey of Puerto Ricans on the U.S. Mainland in 1970, (Praeger, 1975) (hereinafter cited as "Wagenheim"). Frequently, they exist side by side with black communities and white communities forming what is commonly termed a tri-ethnic city.

As a result of many of the same forces that have relegated blacks to the lower rungs of the socio-economic ladder, as well as other factors peculiar to persons who are culturally distinct and whose first language is not English,[2] Puerto Ricans have suffered severely in attempting to secure for their children the benefits of an equal and effective educational opportunity.[3]

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2. According to the United States Department of Commerce, Bureau of the Census; Persons of Spanish Origin in the United States, November, 1969; series p-20, No. 213 (February, 1971), p. 10, 72.1 percent of Puerto Ricans speak Spanish as their first language.

3. Keyes v. School Dist. 1, Denver supra at 197.

On the average Puerto Ricans have less formal education than either blacks or whites. The median number of years of completed schooling (8.6) is approximately the same as that completed by the population of the United States thirty years ago. Nearly 24 percent of Puerto Rican adults (age 25 and above) have completed less than five years of school, as compared with 5 percent of the total United States population and 13.5 percent of the black population. Only 19.8 percent of Puerto Rican adults have completed four years of high school, compared with a United States average of 56.4 percent for whites and 34.7 percent for blacks. Dropping out from school still remains a critical problem for Puerto Ricans: in 1970, among Puerto Ricans between the ages of 16-21, 55 percent were not in school, and 36 percent of these dropouts were unemployed.[4]

Bilingual-Bicultural Education

In an effort to secure for Puerto Ricans, and Hispanos generally, a better and more meaningful educational opportunity, the United States Congress passed Title VII of the Elementary and Secondary Education Act, 20 U.S. §880b (1968), as amended, known as the Bilingual Education Act. Although that legislation, which is essentially a funding source for bilingual-bicultural educational programs, is directed to students with "limited English-speaking ability", it is now accepted that bilingual-bicultural education programs have other objectives which go beyond

4. Wagenheim, pp. 18-21.

rectifying English language deficiencies. The Department of Health, Education and Welfare's definition of bilingual-bicultural education states:[5]

> Bilingual Education is the use of two languages, one of which is English, as mediums of instruction for the same pupil population in a well-organized program which encompasses part or all of the curriculum and includes the study of the history and culture associated with the mother tongue. A complete program develops and maintains the children's self-esteem and a legitimate pride in both cultures. (emphasis added).

A recent study conducted by the United States Commission on Civil Rights entitled, A Better Chance to Learn: Bilingual-Bicultural Education, Clearinghouse Publication 51 (May 1975), concludes at page 141 with the following:

> Although bilingual-bicultural education has been criticized for nurturing ethnic separateness in this country, it can provide one of the best means for diminishing such separation. Without full economic and social opportunity, language minority groups will almost certainly remain isolated, outside the American mainstream.

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5. U.S. Department of Health, Education and Welfare, Programs Under Bilingual Education Act (Title VII, ESEA): Manual For Project Applicants and Grantees (1971), 1.

> If bilingual-bicultural education fulfills its promise to provide educational skills, knowledge, and English language proficiency, it can be a major step in helping to remove the barriers which currently exclude language minority groups from that mainstream. Moreover, it can provide opportunities for all children to learn about and experience the benefits of a multicultural society.

A child's positive self-concept has been emphasized as a sine qua non for effective learning.[6] Language minority group students, including Hispanos, according to a 1966 report by Dr. James Coleman, generally view themselves as not being able to achieve success and doubt to a greater extent than white-Anglo students their ability to learn.[7]

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6. See, e.g. Celia S. Lavatelli, Piaget's Theory Applied to An Early Childhood Education, (Boston: A Center for Media Development, Inc., 1973) p. 42; Muriel R. Seville and Rudolf C. Troike, A Handbook of Bilingual Education, (rev. ed. 1971), p. 32.

7. James Coleman, Equality of Educational Opportunity, Office of Education, U.S. Department of Health, Education, and Welfare. Washington, D.C.; U.S. Government Printing Office, 1966, pp. 288-290.

The United States Commission of Civil Rights attributes this negative self concept to the orientation of many of the school systems in which Hispanos are enrolled:[8]

> It is little wonder that the monolingual English school system fails to provide language minority children the experiences which ensure success and build a positive self concept when their native language and culture are almost totally excluded from every aspect of the school process. Without teachers, instruction, instructional materials, and parents to which language minority children can relate, it is virtually impossible to provide an environment conducive to learning and the development of positive self concept.

That one of the principle purposes of bilingual-bicultural education programs is to alleviate the alienation, and incompatibilities experienced by many Hispano students was clearly expressed by the Commission:[9]

> Bilingual-bicultural education is designed to help the child make the transition from home to school more easily by reducing the differences between the language and culture of the home and that of the school.

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8. A Better Chance to Learn: Bilingual-Bicultural Education, supra at pp. 36-37.

9. Id. at p. 38.

For Puerto Ricans and for Mexican Americans, complete and effective eradication of the consequences of segregation and other forms of education discrimination will often require modification of a school system's orientation. Adopting bilingual-bicultural educational programs as a form of compensatory education is a reasonable and accepted approach to removing barriers which obstruct the expeditious dismantling of a dual school system. Unless district courts are free to exercise their traditionally broad equitable powers to remedy the historic, well recognized effects of a discriminatory school system on Hispanos, any remedy in a tri-ethnic desegregation suit will fail.

By Unduly Restricting The District Court's Equitable Power, The Court of Appeals Has Raised Important Issues Which Should Be Reviewed By This Court

This Court has made it clear that in fulfilling the promise of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), district courts are to be afforded the widest latitude in fashioning appropriate and effective remedies. As far back as Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (Brown II) this Court noted the unique posture of the local district court, its knowledge of and sensitivity to the community under

its jurisdiction, and underscored that variations in local settings require various approaches in redressing discriminatory educational practices:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision.
>
> Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. Id. at 300.

See, United States v. Montgomery County Board of Education, 395 U.S. 225, 235 (1970); Griffen v. County School Board, 377 U.S. 218, 232-233 (1964). In the

evolution of desegregation, flexibility in approach has been the standard, and district courts have employed a panoply of techniques to effectively secure for school children an equal educational opportunity. See, Swann v. Charlotte - Mecklenburg Board of Education, 402 U.S. 1,15 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

The Denver school system is tri-ethnic, a feature which any effective desegregation plan must reflect. Like so many southwestern and northern school districts, it contains large numbers of Hispano school children, who suffer from the same educational deprivations as black children. Keyes v. School District, No. 1, Denver, supra at 197. Indeed, in Denver, Hispano school children comprise a larger portion of the student body than blacks. Keyes v. School District No. 1, Denver, 380 F. Supp. 673, 674 (D. Colo. 1974). The District Court found that these children were not only unlawfully segregated, but suffered from the usual by-products of segregation: low average scholastic achievement, less experienced teachers, higher dropout rates, and inferior physical plants. 313 F. Supp. at 77. Any remedy to dismantle Denver's dual school system could not stop at merely reshuffling black, white and Hispanic

school children. Compensatory programs would have to be established to eradicate the effects of a discriminatory education. The District Court properly concluded on the basis of an extensive record that any effective remedy must contain appropriate comprehensive compensatory educational programs:

> The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education. Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful. 313 F. Supp. at 97.

The adoption of the so-called Cardenas plan constituted for Hispanos just such a program. That bilingual-bicultural educational programs were ordered as part of an overall scheme to end unlawful education discrimination is not startling. Other district courts have ordered programs virtually

identical to the Cardenas plan when dismantling school systems containing significant numbers of Hispanos. See, United States v. State of Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd 466 F. 2d 518 (5th Cir. 1972); Arvizu v. Waco Independent School District, 373 F. 2d 499 (5th Cir. 1974); Morgan v. Kerrigan, (Civ. Act. No. 72-911, June 5, 1975), Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974); cf. Serna v. Portales Municipal Schools, 499 F. 2d 1147 (10th Cir. 1974); Aspira of New York v. Board of Education of the City of New York, supra. The United States Congress has also recognized the need for bilingual-bicultural programs in eliminating segregation and overcoming minority group isolation by authorizing funds to establish such programs in school systems undergoing desegregation. 20 U.S.C. §§1601, 1603, 1607(c)(1) (1972).

The Analysis of The Court of Appeals Was Erroneous

The limitations imposed by the Court of Appeals upon the District Court's equitable power stems from the Court's determination that implementing bilingual-bicultural programs for purposes of compensating for past discrimination required a "finding, on remand, that either the School District's curricular offerings or its methods of educating minority students constituted illegal

segregative conduct or resulted from such conduct." In the context of fashioning relief, the Court of Appeal's narrow view was tantamount to holding that even though a violation of the equal protection clause had been established, and even though the unfortunate by-products of discrimination were well substantiated, the District Court could not adopt a compensatory education program to eradicate these by-products unless each aspect of the school program to be affected also was proven to be unlawfully discriminatory.[10] Confining in this way the scope of a district court's power to forge broad remedies in cases involving system - wide discrimination contradicts this Court's "root and branch" formula announced in Green v. County School Board, 391 U. S. 430 (1968). Further, it would prevent a district court from removing obstacles to full and prompt compliance unless those obstacles were demonstrated to be illegal themselves. Apart from whether the educational program offered to Hispanos was discriminatory, the District Court was presented with ample evidence to conclude that to successfully remedy the effects of a segregated and otherwise discriminatory education, bilingual-bicultural education was appropriate, indeed necessary.

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10. Since the Court of Appeals reversed the District Court's adoption of the so-called Cardenas plan, it found no justification (Footnote cont'd)

As a result of its reasoning, the Tenth Circuit assumed the role of a trial court, superimposed its judgment on that of the District Court's and the educators to whom it listened, and found that bilingual-bicultural programs were suitable only to students

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10. (Footnote cont'd) for clustering Hispano students temporarily in designated pilot schools in order to implement bilingual-bicultural programs. Clustering certain students is a well-recognized dimension of a bilingual-bicultural program. The District Court in Morgan v. Kerrigan, supra considered the clustering of students in accommodating bilingual-bicultural programs in Boston: "Assignment of bilingual students before others will prevent excessive dispersal. Thus the clustering of bilingual classes will be possible and Boston's schools will be enabled to fulfill the promise of this state's exemplary bilingual education law (Transitional Bilingual Education Act, Mass. G.L. c. 71A), as well as to meet requirements of the federal Civil Rights Act of 1964 (42 U.S.C. §2000d). See 35 Federal Register 11595 (1970); Lau v. Nichols, 1974, 414 U.S. 563; United States v. Texas Education Agency, 5 Cir. 1972 (en banc), 467 F. 2d 848, motion to clarify mandate denied, 5 Cir. 1973, 470 F. 2d 1001." at p. 66.

with English language handicaps. Although the trial court cited language deficiencies as one of the obstacles which bilingual-bicultural compensatory educational programs address, it described other obstacles which justified adopting these programs. For example, the Court of Appeals disregarded the trial court's reliance on Dr. Cardenas' testimony respecting the isolation of Hispanic students by virtue of the school system's orientation. 380 F. Supp. at 694-695. Effecting a change in that orientation by implementing bilingual-bicultural programs would, according to the testimony relied on by the District Court, facilitate the realization of nondiscriminatory education.

Thus, the District Court in Denver as well as other courts (See p. 11 supra) were persuaded by the substantial testimony of educators that effective integration of the schools of a tri-ethnic community, consistent with the standards established by this Court, necessitated the introduction of bilingual-bicultural compensatory programs for a wide variety of students, including those who do not suffer from English language difficulties. By overturning this exercise of equitable power, particularly by substituting its view of the purpose of bilingual-bicultural compensatory education for that of the trial court's, the Court of Appeals has ignored the teachings of Brown II and the litany of cases which followed.

CONCLUSION

The decision of the Tenth Circuit raises important questions concerning a district court's power to adopt compensatory programs for Hispanic school children to remove obstacles to thorough and prompt desegregation. As desegregation continues to move North into tri-ethnic cities, it is imperative that the equitable authority of district courts which has been limited and obscured by the Tenth Circuit is clarified.

The Petition for Writ of Certiorari should be granted.

Dated: November 13, 1975

Respectfully submitted,

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